SUPREME COURT, U. S.

No. 73-353

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OCTOBER TERM, 1973

A. L. ABBOTT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The petitioners, retired personnel of the uniformed services, contend that the statutory provisions under which military retirement pay is increased to reflect cost-of-living increases unconstitutionally deprive them of property without due process.

The development of the present retirement pay system for the uniformed services, *i.e.*, the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration (see 37 U.S.C. 101(3); 84 Stat. 2090), is described in the opinion of the court below (Pet. App. 3a-5a). In brief, between 1870 (16 Stat. 320) and 1958, retirement pay was based upon the "recomputation system." Retired personnel received a specified percentage of the current active-duty basic pay for the rank and grade they held at retirement. Whenever the basic pay for active-duty personnel was changed, the retirement pay was also recomputed.

In 1958, the recomputation system was suspended by an amendment to the Career Compensation Act (72 Stat. 122, 128), which provided a six and one-half percent increase in active-duty pay, but only a six percent increase in retirement pay. In 1963 the recomputation system was repealed, and the present system was established by the Uniformed Services Pay Act of 1963 (77 Stat. 210). Retired personnel now receive a percentage of the active-duty basic pay in effect at the date of their retirement or 1958, whichever is later, plus an additional amount based upon increases in the Consumer Price Index. See 10 U.S.C. 1401a. Retirement pay is not reduced to reflect decreases in the Consumer Price Index (cf. Pet. App. 7a).

Petitioners claim (Pet. 18-19) that they have been deprived of property without due process to the extent that the retirement pay increases they have received under the present system are less than increases would have been under the recomputation system, assuming it had remained in effect and assuming past increases in active-duty pay would have been unaffected. In rejecting this same claim in *Andrews* v. *United States,* 175 Ct. Cl. 561, 563, the Court of Claims held that retired "officers have no vested or contractual right to any particular amount of retired pay." Rather, it is dependent on statutory enactment. See *Bell* v. *United States,* 366 U.S. 393, 401. Moreover, as the court below noted in adhering to this principle in the present case, all petitioners now receive more retirement pay than when first retired (Pet. App. 7a).

In *Richardson* v. *Belcher,* 404 U.S. 78, and *Flemming* v. *Nestor,* 363 U.S. 603, this Court held that the reduction or complete withholding of Social Security benefits did not constitute a deprivation of "property" within

the meaning of the Due Process Clause, even though such benefits are financed in part by the beneficiary's contributions. With regard to retirement pay, as with Social Security benefits, the analogy to "property" cannot "be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement," *Richardson* v. *Belcher, supra,* 404 U.S. at 81.[1] In holding that petitioners' interest in retirement pay increases under the recomputation system was not a vested property right, the Court of Claims' decision is thus consistent with this Court's holdings in *Nestor* and *Belcher.* See also, *Fleming* v. *Rhodes,* 331 U.S. 100.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] Because the present controversy pertains only to the method of computing post-retirement increases in retired pay, it is unnecessary to decide the primary issue presented by petitioners (Pet. 10-16), *i.e.,* whether, in general, retirement pay is deferred compensation for past services or compensation for present standby duty or a combination of both. If retirement pay is for past services, the expectation of specific pay increases is too speculative at the time the services are performed to be deemed a vested property right. If retirement pay is for present services, no right to a specific payment vests prior to the performance of the services.

[2] Petitioners also suggest that the present retirement pay system is unconstitutionally discriminatory because rates of retirement pay vary depending upon the recipient's date of retirement (Pet. 3, 7-9). The present system, however, is not so devoid of a rational basis as to offend the concepts of equal protection inherent in the Due Process Clause. See *Belcher, supra,* 404 U.S. at 81. Moreover, petitioners' allegation of discrimination between regular and reserve servicemen, both of whom retire at age 37 (Pet. 8-9), ignores the fact that the retired reservist, unlike the retired regular, cannot receive any retirement pay until he attains age 60. 10 U.S.C. 1331.

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